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ADMINISTRATIVE PROCEDURE: A REPORT AND AN EVALUATION

FRANK E. HORACK, JR.†

When Lord Hewart in 1929 challenged that "to employ the terms administrative 'law' and administrative 'justice' to such a system, or negation of system, is really grotesque,"¹ he key-noted a controversy which courts of law had kept alive since the ascension of "equity." In bold reply the Report on Ministers' Powers asserted that "It goes without saying that it is the duty of every Minister or Ministerial Tribunal, to whom the function of adjudication is assigned, to act judicially and to come to decisions in the spirit and with the sense of responsibility of a tribunal whose task it is to mete out justice. But it does not follow that the procedure of every such tribunal must be the same * * * so long as the principles of natural justice are observed, a certain degree of elasticity may be not only necessary but desirable."²

A similar history clothes the Final Report of the Attorney General's Committee on Administrative Procedure. Agitation for administrative law reform crystallized in the early editions of the Logan-Walter bill and prompted the Attorney General when appointing his committee to observe that "Some criticisms have from time to time been directed at certain features of administrative procedure. It would tend toward a clarity of thinking to ascertain in a thorough and comprehensive manner to what extent, if any, these criticisms are well founded and to suggest improvements if any are found advisable."³

This point of reference conditioned at least in part the form

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1. Hewart, *The New Despotism* (1929) 44. "The exercise of arbitrary power is neither law nor justice, administrative or at all. The very conception of 'law' is a conception of something involving the application of known rules and principles, and a regular course of procedure. There are no rules or principles which can be said to be rules or principles of this astonishing variety of administrative 'law,' nor is there any regular course of procedure for its application." *Ibid.*

2. Committee on Ministers' Powers (London, Cmd. 4060, 1932), *Report* 99.

3. Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 253.

and flavor of the report. It had the salutary effect of directing a specific and detailed evaluation of the practices of 27 of the more important administrative agencies. Under the direction of Professor Walter Gellhorn a report on the procedure of each agency was presented to the committee. With the benefit of this concise and incisive information the certainty of easy generalization should have been dispelled and it might have been hoped that a united report would result. Instead two reports emanated and the majority's apparent attempt to temper its position and gain unity failed.

THE MAJORITY REPORT

No single fact is more striking in a review of existing Federal administrative agencies than the variety of the duties which are entrusted to them to perform * * * A procedure which would be for the protection of the individual in one situation may be clearly to his injury in another.⁴

The nine chapters of the majority report constitute perhaps the best analysis of administrative law and procedure now available. Though not a great political document in the sense of *The Federalist*, nor perhaps detailed enough to be classed as a great scientific tract the report in its own way is great. In comparison the recommended accompanying bill, now known as S.675 is disappointing. At least judged by the conclusions of the preceding nine chapters the bill only tempers the wind to the wolf in sheep's clothing.

The Origins, Development, and Characteristics of the Administrative Process. In the short twenty-four pages of this first chapter, the committee discloses, in a more realistic fashion than ever before available, the origin and growth of administrative agencies and the reasons and consequences of that growth. The illusion that we are meeting today a new and greedy monster is, I hope, forever dispelled by the careful documentation of the antiquity of many of the agencies themselves and of the methods which most of them employ. The argument of novelty is always open to suspicion, but when it is demonstrated, as it has been by the report, to be untrue, let us hope that the argument may be afforded a much needed repose.

Even more constructive than the documentation of the tenure of the administrative process in the United States is the catalog

4. Id. at 20. Contrast with Statement of Minority, id. at 203 et seq.

of reasons for resort to the administrative process. Certainly of most compelling weight is the committee's conclusion that the "insistence of the courts upon confining themselves to judicial, as distinguished from executive or legislative, functions has made inevitable the conferring of a wide range of powers * * * upon some one of the executive departments or upon an independent agency."⁵ Faced with this necessity, congressional delegation to administrative agencies has tended to preserve the "rule of law" to a greater degree than would similar delegation to the executive alone. Thus, it appears that Congress, rather than avoiding, has sought the "rule of law" by the only course practically available to it.

The report likewise emphasizes the volume of administrative work with its attendant need for hundreds of skilled technicians and scientists and its thousands of employees skilled in record keeping, reporting, and administration generally. And these thousands have been required because a single administrative agency frequently disposes of many more claims and disputes in a year than the entire federal judiciary settles in a similar period. Perhaps the time has come when government must take over the enforcement of private rights, as in an early time it had to replace private prosecution with criminal administration. Whatever the cause, and however well the job is being done, it seems certain that administrative tribunals are bringing orderly adjudication to a much larger percentage of our citizenry than the judicial system has ever been able to achieve. Perhaps the "rough justice" of administration is better than no justice at all. And this latter condition, unfortunately, is all too frequent where court costs, attorney fees, and the burden of delay effectively preclude a majority from the protection of the judicial system.

Administrative Information. A canvass of much that has been written and said about administrative agencies discloses widespread ignorance of even the simple structure, organization, and procedure of the most common agency. Thus the recommendations of the majority that the agency should exert every effort to disseminate information concerning its structure and organization is, of course, undebatable. But when it proceeds to recom-

5. Id. at 13.

mend and incorporate in its bill that "As soon as the 'policies' of an agency become sufficiently articulated to serve as real guides to agency officials in their treatment of concrete problems, that fact may advantageously be brought to public attention by publication in a precise and regularized form,"⁶ it has gone too far. The ability to raise suspicion without the ability to prove or disprove it is characteristic of this provision, although its directory nature is less subject to censure than the mandatory character of the minority's similar requirement.⁷ Likewise, the committee suggests that interpretations, staff instructions, and understanding should be made public. The flavor of these recommendations suggests unnecessary distrust of administrative agencies. Administrators are human, of course, but certainly one human characteristic is the avoidance of trouble, and it seems altogether probable that an administrator who can avoid controversy and escape the burdens of unnecessary enforcement will be eager to disseminate any information that will lighten his load.

This difficulty results primarily from the casual administrative practitioner who is unacquainted with the numerous information services maintained by the agencies. Only time and inquiry will arm him with sufficient information to escape the pitfalls of his own ignorance.

Declaratory Administrative Rulings. The majority's bill grants to an agency tribunal the discretionary power to "issue declaratory rulings concerning rights, status, and other legal relations * * * in order to terminate a controversy or remove an uncertainty."⁸ Whatever reservations may be necessary concerning the constitutionality or the workability of this particular proposal, the committee cannot be too highly praised for proposing it. Although life and law are mostly prediction, habit and custom have for the bulk of society provided security and made prediction based on words and actions fairly reliable. Administrative officials are unwilling exceptions to the rule. And courts have placed them in this unenviable position.

In everyday contacts of life it is easy to forget how necessary and important this ability to rely on another's word and to treat the future not as prediction but as fact, really is. Its value is

6. Id. at 27.

7. See id. at 226, Minority Bill sec. 203 (c).

8. Id. at 202, Majority Bill sec. 401.

best emphasized when it is absent. For example, in *State v. Foster*,⁹ the defendant wished to open a store temporarily to sell goods to the Christmas trade. He sought the best advice he could get. The highest court was foreclosed to him, both by the rules of procedure, and by the more pertinent fact that they could not give him an opinion under any circumstances until long after the Christmas trade would be over. He went to the state auditor and inquired if he needed an itinerant vendors' license. He was informed that he did not. Later he was prosecuted for violating the statute and was told that although he had acted on the best advice then available, he must nevertheless pay a fine. This, of course, is manifestly unfair, but unfortunately similar occurrences are not infrequent in the administration of the law.

For example, if a taxpayer is uncertain concerning his liability for taxes on a proposed business deal, the only way he can determine his liability is to go ahead with the deal and take the consequences. This is true not so much because administrators are unwilling to give opinions in advance as because courts will not give effect to such interpretations; and thus administrators think it unfair to give advice to applicants when the applicants cannot rely on it.

Fortunately for most of us, we may act without fear that at some subsequent time our acts will be considered unlawful, but there is an ever increasing need for binding interpretations of the law precedent to action. This the committee report seeks to provide. The generality of its provisions, however, seems inadequate.

In section 402, declaratory rulings are given the effect of a final order. This application seems too narrow unless the tribunal itself may in the final order condition the ruling so that it is binding on subject matter not in issue upon the final order. For example, it would be advantageous to a prospective taxpayer to procure a declaratory ruling on the valuation of stock for stock transfer tax or income tax purposes. It might be disadvantageous if the rule was binding for inheritance or gift tax purposes. The fact determination in each case is the same, and it, therefore, seems desirable, if the taxpayer is to gain the advantage of a declaratory ruling, that the Bureau of Internal Revenue

9. (1900) 22 R. I. 163, 46 Atl. 833.

should also gain the advantage of finality in all cases involving the fact situation ruled upon. To permit the taxpayer at a later date to litigate the valuation question in a gift tax proceeding should not be permitted.

Section 403 makes a declaratory ruling binding upon all parties "who have or claim any legal interest which would be affected by the declaration."¹⁰ The effect of this provision is limited, for no declaration shall prejudice the rights of persons not party to the proceedings. The desirability of this limitation may be doubted. One of the principal uses of the declaratory ruling procedure would be to determine the status of an indeterminate class of persons or a class where "legal notice" would be impractical—as, for example, the interest of bondholders, resident in numerous judicial districts, under a reorganization proceeding. In such a case it would be impractical to give all parties notice unless it could be given in the equity sense. Of course, section 403 permits the rule to have binding force on those voluntarily coming into the proceedings to "claim any legal interest," but it may readily be anticipated that unless the "class suit" type of notice can bind all parties affected, many persons will intentionally remain out of the proceedings in order to preserve their rights for later judicial litigation. It seems desirable to clarify this section to make it certain that upon the initiation of the department all persons may be bound as parties so that the procedural defects of district court jurisdiction may be escaped and that a minority of persons can be prevented from continuing litigation and preventing a final settlement at their will.

Although closer study will disclose many minor deficiencies in the proposals for declaratory rulings, the significance of the proposal for a more speedy and fairer procedure both to the government and private individuals suggests that this recommendation may become the most significant contribution of the committee's report.

Administrative Rule Making. Compared with the impractical provisions of the Logan-Walter bill, the recommendations of the majority certainly are not open to severe censure. Yet it seems that the committee was unwilling to take a strong stand against

10. Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 202.

required notice and hearing in rule making proceedings. It declared that it "believes that the practice of holding public hearings in the formulation of rules * * * should be continued and established as standard administrative practice, to be extended as circumstances warrant into new areas of rule making."¹¹

A *priori* judgment on this issue is questionable. On some occasions, notice and hearing will provide administrators with detailed information which they could procure in no other way. Again, it may assist in preserving cooperative relations between enforcement and industry. Again, it may be injurious to enforcement by warning that existing practices will be prohibited and thus permit an acceleration of those practices in the period immediately preceding promulgation. Finally, it may be only useless, consuming the time of both the interested parties and the agency without producing tangible improvement in the completed rules. Legislative and administrative hearings have time and again disclosed these variables. Thus it seems to this reviewer that the majority, though perhaps impelled by considerations of policy, was unjustified in encouraging an extension of legislative notice and hearing practices, to all fields of administration.

The committee also recommends more formal promulgation of administrative regulations. This seems an immediately desirable recommendation. There will be a few emergency situations where delay in the time of taking effect will be either impossible or impractical but generally the job of the enforcing officer will be made easier and the enforcement itself will seem fairer if those who must abide by the regulations have an opportunity to prepare for that event.

The judicial review of legislative rules, like the requirement of hearing, was a major concern of the Logan-Walter bill. The committee, however, on this occasion took a strong stand in opposition to the review requirement, when it asserted that "if an administrative agency is best qualified to weigh the facts and opinions that culminate in regulations, its conclusions should be final and it is no anomaly that they are."¹² Even though some statutory review provisions now permit judicial inquiry at the enactment stage, the conclusions of the report should stand as a warning against their further extension.

11. Id. at 108.

12. Id. at 119.

Administrative Adjudication. Embroiled in the whirlpool of controversy over the prosecutor-judge complex, the majority expended great space¹³ discussing the problems of formal methods of administrative adjudication, although it had previously concluded quite accurately that "informal procedures constitute the vast bulk of administrative adjudication and are truly the lifeblood of the administrative process."¹⁴

Apparently convinced that the separation of powers opponents would and could demand complete separation of the investigatory and adjudicating functions, the majority conceded the desirability of separation but offered the alternative of internal agency division of function. This certainly was not a radical proposal, for indeed the separation of powers, as has so frequently been pointed out, is little more than an appropriate division of labor, and so most agencies have already to a greater or less extent found separation a serviceable organizational device.

The alleged subordination of all employees to the wish and word of the administrative head has made the administrator the bogey man of unfairness. And so even the majority concluded that as long as the adjudicator was subject to the influence of the administrator, he would not be independent. Thus they proposed to create "hearing commissioners" who will serve two masters and thus defy the Biblical admonition.

The committee proposes that "To each agency * * * there should be added officials to be known as hearing commissioners to hear cases. These officials should be men of ability and prestige, and should have a tenure and salary which will give assurance of independence of judgment. They should be appointed for stated terms of seven years, and be removable only upon formal charges of fraud, neglect of duty, incompetence, or other impropriety."¹⁵ Appointment is to be made by a newly created office, the Office of Federal Administrative Procedure. The determination at the hearing is binding upon the department unless after proper notice and within a reasonable time the case is called up for review by the head of the agency.

Hearing commissioners are to be nominated by the agency but "shall be appointed by the Office of Federal Administrative Pro-

13. *Id.* at 43-95.

14. *Id.* at 35.

15. *Id.* at 46.

cedure if that office finds him to be qualified by training, experience, and character to discharge the responsibilities of the position."¹⁶ The hearing commissioner may be removed only upon charges made after hearing held by the Office of Federal Administrative Procedure. Thus in every way his tenure attaches to an office independent of the agency for whom he works. But his salary shall be paid from agency funds. Thus if the "premise of influence" over trial examiners and hearing commissioners is correct, the hearing officer will indeed feel many inconsistent pressures.

Although this is a novel proposal in American administrative practice, I feel that it is too early to ascribe to it the great significance that present discussions attribute. Although the attempt to gain independence of hearing officers without complete divorcement from the agency is a compromise, I think it should not be pre-judged either favorably or adversely. The psychological advantage of independence from the point of view of the criticizing minority of the public, is, of course, attractive. To what extent the independence of position will attempt to delay and harass orderly administrative practices as viewed by the department can hardly be determined in advance.

In only two situations do we have previous experience in American administrative law. One is with the courts themselves and the other with the administrative tribunals such as the Board of Tax Appeals and the Court of Customs Appeals. The hostility of many courts toward administrative practice, of course, has long been asserted by administrative officials and seems in part substantiated by experience. Likewise in the case of administrative courts, certain apparent frictions have existed between the Bureau of Customs and the Customs Court and the Bureau of Internal Revenue and the Board of Tax Appeals. But these instances are perhaps isolated and the committee may be justified in suggesting this new proposal. Certainly, however, its long and rather involved argument in favor of the semi-independent hearing officer smacks more of expediency than of conviction. Pages of conjecture might be written concerning the possible evils and benefits but little can be known without a trial of the proposal.

16. *Id.* at 196, Majority Bill sec. 302 (3).

Judicial Review. The majority is not particularly troubled by the hue and cry of "insufficient judicial review." While the committee does devote considerable space to the consideration of the multiplicity of channels through which administrative action may flow to the courts, and while it recognizes that considerable diversity exists between statutory provision for review, it nevertheless concludes quite appropriately that "When and if the Congress is dissatisfied with the existing review of particular types of administrative determinations, it then may and should, by specific and purposive legislation, provide for such change as it desires. Only by addressing itself to particular situations, and not by general legislation for all agencies and all types of determinations alike, can Congress make effective and desirable change."¹⁷

This statement should be sufficient for the purposes of this review, and indeed it provides the most authoritative and well documented determination that has yet been written on this subject. Further elaboration would certainly be presumptuous.

THE MINORITY REPORT

Federal administrative agencies * * * are now an enterprise of gigantic proportions, far overshadowing in power, personnel, and prestige the largest industrial establishments.¹⁸

Although identified in the Report as the "Additional Views and Recommendations of Messrs. McFarland, Stason, and Vanderbilt," it is certainly more accurate to view with scepticism their declaration that they have "accepted the major outlines of the report * * * and * * * have departed as little as possible from the solutions suggested by the full Committee,"¹⁹ and consider their report as a dissent to the proposals of the committee.

The method of presenting the minority report is indicative of the difference between the two groups. While the majority found it necessary to present their report from the background and experience of the several agencies as they operated in fact, the minority discovered that "the separation of functions," "judicial review" and "legislative standards" were sufficient starting (and stopping) points. This is a bit surprising in light of the general

17. Id. at 92.

18. Id. at 213.

19. Id. at 203.

familiarity of these men with and experience in the administrative process. If this was possible for them, how delusively attractive must the old generalizations be, for those less familiar with, and more dogmatic concerning the administrative process.

The Separation of Functions. The minority finds the separation of functions necessary because "history and tradition have given English-speaking peoples a governmental pattern which they regard as the essence of fair adjudication."²⁰ They find that this tradition requires that the legislators must only legislate, the prosecutor only prosecute, and the judge only judge. Delusively simple. But certainly the prosecutor is judging when he refuses to prosecute, and the judge is legislating when he "interprets" the law. And why not? These are results only, and the question is, are the results good or bad? This the minority only assumes when it asserts that the plan of the majority "cannot fully achieve the complete independence that is essential for the exercise of the adjudicatory function."²¹

The minority thus concludes:

Hearing and deciding officers cannot be wholly independent so long as their appointments, assignments, personnel records, and reputations are subject to control by an authority which is also engaged in investigating and prosecuting * * * such dependents (sic) cannot be eliminated by measures short of complete segregation into independent agencies.²²

But the bill proposed by the minority does not go so far and only reiterates the proposal of the majority, that "where agencies or their members or representatives make formal adjudications, there shall be a complete segregation of prosecuting from hearing and deciding functions,"²³ unless the greater authority of the Office of Federal Administrative Procedure over the selection and tenure of hearing commissioners may be construed to be the minority's effort for the cause of separation.²⁴

Obviously, our criticism of the majority's pre-judging of what is a necessary separation of function applies even more forcefully to the minority's position. Further and more direct attack should be made against the minority's suggestion that "at this

20. Ibid.

21. Id. at 208.

22. Id. at 209.

23. Id. at 236.

24. Id. at 237-9.

stage of procedure deciding officers should, except for proper use of official notice and clerical help, confine their consideration strictly to matters of record produced during formal proceedings."²⁵

It is very difficult to visualize the minority's conception of a hearing officer: at one moment he is a monster bent on vilifying a defenseless citizen without regard to form or fair play; again he is a Casper Milquetoast and will be led astray even by administrative subordinates, who no doubt with Machiavellian cunning will seduce his judgment and determination: for certain, though, he must be ignorant, for by the very terms of the minority's proposed statute both he and his assistants must decide the case upon only so much information as the parties to the proceedings see fit to divulge.

Judicial Review. With a showing of temperance, the minority suggest that judicial review "should not be too broad and searching or it will hamper administrative efficiency. It should not be so restricted or so devitalized as to fail as a check upon palpable administrative error or abuse of power."²⁶ But upon a consideration of the deficiencies in the present system of judicial review, the minority finds that since the Supreme Court in *Railroad Commission of Texas v. Rowan & Nichols Oil Co.*²⁷ indicates that it will not review fact-issues involving due process, equal protection, and other constitutional guarantees, new legislation must reverse the trend of the past two decades. Apparently the minority overlooked the fact that the liberties of property were not thought to be jeopardized during the century that preceded the *Ben Avon* decision.

Likewise the minority is restive under the *substantial evidence* rule and suggests that the court "should set aside decisions clearly contrary to the manifest weight of the evidence."²⁸ If

25. Id. at 209. "In the consideration and decision of any case, hearing or deciding officers shall personally master such portions of the record as are cited by the parties. They may utilize the aid of law clerks or assistants (who shall perform no other duties or functions) but such officers and such clerks or assistants shall not discuss particular cases or receive advice, data, or recommendations thereon with or from other officers or employees of the agency or third persons, except upon written notice and with the consent of all parties to the case or upon open rehearing." Id. at 242, Minority Bill sec. 309 (m) (4).

26. Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 211.

27. (1940) 310 U. S. 573.

28. Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 211.

enough dispute has not already been occasioned by the ambiguity of the substantial evidence rule, certainly the new phrase will suffice to change judicial review into judicial supremacy over the facts as well as the law. But this basic assumption that the court will act correctly and the administrative agency will act incorrectly certainly has not been reflected in general public attitudes or in specific legislative restrictions, and it may be presumed that this postulate is more in the minds of the minority members than "in the hearts of their countrymen."

Apparently, upon reflection, the minority added that some fact determinations "are rendered by long-established, well-tried tribunals in whom all persons have confidence; some come from new and hurriedly organized agencies,"²⁹ and that the courts should have discretion as to the agencies in which they should place reliance. This seems to suggest *review by suspicion* which can hardly be consonant with constitutional verities implicit in judicial supremacy.

The minority then suggests that Congress devise legislation which would classify the "several types of issues decided by each administrative agency"³⁰ and "provide special degrees of review as to each."³¹ "The graver the possible effects of the error"³² and the court's judgment whether the tribunal was "trained by experience to decide the questions at issue,"³³ would determine the degree of review.

The minority's position is untenable. The suggestion that the court need review "fact questions arising under employees' compensation legislation"³⁴ with less scrutiny than questions involving "important issues arising under a regulatory statute, involving the limits of interstate commerce"³⁵ admits that review is unnecessary to protect the interests of the "little man." "Largess for largeness" should hardly be the motto in a democracy.

Likewise, the reliance upon courts to determine the sufficiency of agency experience places the test of competence in a body which from the very generality of its function must forever be

29. *Ibid.*

30. *Ibid.*

31. *Id.* at 212.

32. *Ibid.*

33. *Ibid.*

34. *Ibid.*

35. *Ibid.*

removed from the detail of information necessary to determine competence in fields of specialization.

Legislative Standards of Fair Procedure. The minority emphasizes that administration has grown "without the benefit of an over-all guiding hand to appraise and improve."³⁶ This is perhaps a blessing. The common law has frequently been criticized for its failure to diversify and to make its rules reflect the needs of differing situations. Administrative procedures hewn from the experience of a particular agency may more accurately reflect the best procedure for that agency than does a procedure which fits into some over-all symmetry. Not until we know that two or more agencies have similar problems, similar quantities and quality of work, and similar types of determinations will we be in a position to say with assurance that the need for uniformity in procedure is compelling. This the minority recognizes, for it indicates that the remedy "is to identify the few basic considerations and express them in legislative statements of policy, of principles, or of standards for the guidance of administrators, subject always to reasonable variation to meet varying needs."³⁷ Certainly no one can seriously dissent from this policy, even though many of the specific recommendations are already such common administrative practice that it seems perhaps a little presumptuous to direct administrators to act in a manner that they have always followed and thereby imply, perhaps, that such has not been their course.

Some of the statements of policy, however, are more than guides for administrators—they are commands, and to this reviewer they appear to be unwise commands. It is true that by direction of the President they may be modified, but I fear the day is not long enough, nor his staff of assistants large enough to do the job.

First, section 202 attempts to substitute administrative legislation for administrative adjudication as far as possible. Certainly as a general objective this is desirable and it is obvious that every good administrator will seek to avoid controversy by issuing rules and regulations in advance of conflict wherever possible. But it seems both optimistic and unwise to direct administrators to publish as rules all "general policies not clearly

36. Id. at 213.

37. Id. at 214.

specified in legislation"³⁸ and to prohibit agency action on any unpublished statement of policy. Although this provision seems entirely impractical of enforcement, its very existence permits the harassment of the agency—for who can demonstrate that there was not a "secret policy." Its very allegation will go far to destroy public confidence, and the agency denial will have little counteracting effect once the seeds of suspicion are planted. Courts of law have always held that the motives of legislators are not available in the interpretation of statutes. And even the severest critics of the courts have not suggested that they have followed secret policies in their determinations. To single out the administrative agency is to contrast and attack its integrity. Can the charge be sustained?

Although detailed directions concerning the adoption of rules are set forth in sections 205-210, the provisions escape the objection of similar directions in the Logan-Walter bill, inasmuch as they are directory only.³⁹ Certainly, so long as rule-making is a legislative function, the same flexibility of procedure which attends legislative determination should be preserved.

The minority's conceptions of "Fair Standards of Procedure" reflect primarily their attitudes on judicial review. These conceptions need not be discussed except so far as they make mandatory the issuance of declaratory rulings upon the petition of any interested party.⁴⁰ It seems quite obvious that no agency could long survive a concerted request for declaratory rulings unless they had the power to select the propositions on which they were prepared to rule. Useful as declaratory rulings are, they can be of value only where there has been a full disclosure by the petitioner, where the petitioner will be bound not only on the particular case, but on all cases relating to the same set of facts, and where the agency is prepared to commit itself to a particular policy. Although the ruling in a particular case is not binding upon persons who are not parties, administrators must live in a society where discriminatory treatment is not acceptable,

38. *Id.* at 225, Minority Bill sec. 202 (b).

39. But directory words have been interpreted as mandatory when they relate to public officials. *People ex rel. Reynolds v. Buffalo* (1893) 140 N. Y. 300, 35 N. E. 485; *Pierson v. People ex rel. Walter* (1903) 204 Ill. 456, 68 N. E. 383.

40. Attorney General's Committee on Administrative Procedure, *Final Report* (1941) 234, Minority Bill sec. 304.

and where laymen neither accept nor understand the dry legal defenses of *res judicata*, and parties in interest. Indeed, the average administrator must comply with a higher sense of fairness than the minority's legal wisdom has imagined.

The minority's position is essentially hostile to administration. It reflects the reluctance of some practitioners to accept the technique of administrative adjudication. The common law lawyer must have his, the common law, way or else! But the common law, successful as it has been, is still only one method of settling disputes. The need for expeditious and simple settlement of controversies greatly exceeding in bulk the amount of common law litigation cannot be handled by common law procedures. Neither can the procedures which must be substituted be tested by the doctrines of the common law. There must be fair play, and honesty and justice, but it must be discovered in different devices and procedures, produced by the intelligent and willing and indeed, humble cooperation of those that operate the system. It cannot be legislated by those who are fundamentally opposed to the system and who consciously or unconsciously suspect the system and all those who are sworn to operate it.

RECOMMENDATIONS OF CHIEF JUSTICE GRONER

Convinced that neither the majority nor minority went far enough to insure the separation of functions, Chief Justice Groner would like to create wholly independent adjudicatory tribunals, but realizing that there was practically no sentiment for that position, suggested in compromise that the hearing commissioner "be appointed by the proposed Office of Administrative Procedure wholly on its own responsibility, receive his salary from it and not from the agency's funds, be answerable to it alone, and be assigned by the Office to the hearing of cases as the needs of the agencies require."⁴¹ He concludes that "Only by this, or some like method, can it be hoped to obtain that which is the fundamental right of the citizen to have—an open, fair, and unbiased determination of his rights when charged by the Government with violation of a regulatory statute."⁴²

While all can probably agree with him that the founding fathers did decree that "there should be no oppression, no ex-

41. *Id.* at 250.

42. *Ibid.*

action by tyranny, no spoilation of private right by public authority, and that there should be a fair, honest, effective Government to maintain the things which were thought to be the prerogatives of every individual man,"⁴³ few would agree that the administrative system *qua* system has jeopardized these objectives. For whether we like what the agencies have or have not done, it remains that the people of America have not been convinced that the experiment with law enforcement through administration has been so unsatisfactory that it should be abandoned or seriously restricted. On the other hand, they have continuously enacted legislation limiting judicial review, denying courts the right to issue injunctions in particular cases, and substituting administrative determination for judicial decision as far as possible. If the American people have, in the past sixty-five years, expressed themselves, it is to the effect that they wish fair settlement of disputes and that they expect government to provide that settlement. But in choosing the manner of settlement, it seems clear that between the judiciary and administration they have placed their confidence at least equally in administrative justice.

CONCLUSION

Although it seems certain that there will be much contemporary controversy over the proposals of the majority and the minority, and indeed, additional independent proposals,⁴⁴ the significance of the report itself is not contemporary. It presents a view of past administrative experience and indicates both a method of action and a method of study for the controversies of the future. And as neither this nor future administrations can afford to assume the responsibility for the enforcement of the laws without the ability to discharge that responsibility, "It is doubtful if anything like the Logan-Walter bill has a chance of becoming a law."⁴⁵

Likewise, as lawyers become better acquainted with the opera-

43. *Ibid.*

44. See Senate Bill 918 whose sponsors assert that it has taken the "good points" from both S. 674 and S. 675, but it seems upon examination to take nothing from S. 675 and only add some of the more stringent provisions of the Logan-Walter bill to the already great scriptures of S. 675 itself.

45. Everett Sanders, Secretary to the former President Coolidge, now of the District of Columbia Bar, in an address to the Indiana University Law School Alumni banquet, April 19, 1941.

tion of administrative tribunals, learn of them not from newspaper editorials and political orations but from actual trial experience, the hue and cry will subside. Improvements in administration will be made not by frontal attack but by the more orderly husbandry of constant attention. The Final Report of the Attorney General's Committee will then receive recognition as the turning point in professional attitude toward the administrative process. Certainly it will assume a position of such significance that no scholar of law or government can afford to be ignorant of its content.